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No. 86-656

In the Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien only if his activities—and not just his presence or entry—would be prejudicial to the public interest.

2. Whether 8 U.S.C. 1182(a)(27) permits denial of a visa to an alien based on foreign policy concerns only if those concerns are independent of—and not just in addition to—the alien's affiliation with organizations listed in 8 U.S.C. 1182(a)(28).

PARTIES TO THE PROCEEDING

Petitioners in *Reagan* v. *Abourezk* are President Ronald Wilson Reagan, Secretary of State George P. Shultz, Attorney General Edwin Meese III, and Commissioner of the Immigration and Naturalization Service Alan C. Nelson; petitioners in *Shultz* v. *City of New York* and *Shultz* v. *Cronin* are Secretary Shultz, Attorney General Meese, and Commissioner Nelson. Respondents in *Reagan* v. *Abourezk* are James Abourezk, Douglas Cassel, Jr., John Coatsworth, Rev. Harvey Cox, Don Edwards (individually and as a Member of the House of Representatives), Sidney Lens, George Overton, Richard Parker, Charles E. Schumer (individually and as a Member of the House of Representatives), James M. Shannon (individually and as a Member of the House of Representatives), Paul Tsongas (individually and as a Member of the House of Representatives), Mortimer B. Zuckerman, Chicago Lawyer, Ltd., Chicago Religious Task Force on Central America, First Parish Church of Concord, Massachusetts, Institute for Policy Studies, Unitarian Universalist Service Committee, Washington Office on Latin America, Dr. Dana McLean Greeley, and Phillippe Villers; respondents in *Shultz* v. *City of New York* are the City of New York, Edna Acosta-Belen, Chai Feldblum, Jill Gay, Thomas H. Holloway, Sally McConnell-Ginet, Barbara Corrado Pope, David S. Rudstein, Mary Kay Vaughan, Committee on Religion, Ethics and Social Policy, Committee on U.S.-Latin American Studies, Institute for Policy Studies, and New College of California; respondents in *Shultz* v. *Cronin* are Bruce Cronin, Judith Freiwirth, Anthony Palomba, Mobilization for Survival, Boston Mobilization for Survival, and New England Campaign to Stop the Euromissiles.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 785 F.2d 1043. The opinion of the district court (Pet. App. 65a-80a) is reported at 592 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals (Pet. App. 82a-83a) was entered on March 11, 1986. A petition for rehearing and a suggestion of rehearing en banc were denied on May 23, 1986 (Pet. App. 84a, 85a). On August 13, 1986, Justice White extended the time for filing a peti-

tion for a writ of certiorari to September 20, 1986. On September 16, 1986, Chief Justice Burger further extended the time for filing to and including October 20, 1986. The petition for a writ of certiorari was filed on October 20, 1986, and was granted on December 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. (& Supp. III) 1182 provides in relevant part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct

predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt * * *.

* * * * *

22 U.S.C. 2691 provides:

(a) For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

(b) This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) This section does not apply with respect to any alien who is a member, officer, official, representative, or spokesman of the Palestine Liberation Organization.

(d) The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.

STATEMENT

1. a. The terms and conditions under which aliens may enter the United States, as visitors or as immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 *et seq.* (Immigration Act or Act). The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104.

With exceptions not relevant here, no alien may enter the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26). Nonimmigrant visas are issued to aliens seeking temporary admission into the United States for one or more of the purposes specified in 8 U.S.C. 1101(a)(15). The authority to grant or deny such visas is assigned to consular officers (8 U.S.C. 1201, 1202), and no visa may be issued if the consular officer "knows or has reason to believe" that the applicant is ineligible to receive a visa under the Act (8 U.S.C. 1201(g)).[1]

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[1] The alien has "the burden of proof * * * to establish that he is eligible to receive such visa * * * or is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361. Any alien may apply or reapply for a visa at any time, and each visa application is given independent consideration by the consular officer on the basis of the facts and circumstances known at the time of the particular application. See 22 C.F.R. 41.90.

Section 1182(a) of the Act lists 33 separate categories of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States." Two categories are at issue in these cases, 8 U.S.C. 1182(a)(27) (Subsection 27) and 8 U.S.C. 1182(a)(28) (Subsection 28). Subsection 27 applies to "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Subsection 28 applies, inter alia, to aliens who are, or at any time have been, "members of or affiliated with * * * the Communist or any other totalitarian party * * * of any foreign state, [or] * * * any * * * affiliate * * * of any such * * * party."

Under 8 U.S.C. 1182(d)(3)(A), aliens falling into 30 of the 33 categories contained in Section 1182(a) may, in certain circumstances, still be granted a visa. A visa may issue to such aliens if, inter alia, the Secretary of State or consular officer recommends that a visa be granted, and the Attorney General, in his discretion, approves the recommendation. Subsection 28 is one of the categories subject to this waiver of ineligibility; Subsection 27 is one of the three categories that is not.

Certain standards for the Secretary of State's determination whether to recommend a waiver to the Attorney General under Section 1182(d)(3)(A) for aliens otherwise excludible under Subsection 28 are prescribed by 22 U.S.C. 2691, commonly known as the McGovern Amendment. The Amendment provides that the Secretary "should" make such a waiver recommendation in the case of "any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization," unless the Secretary certifies to Congress that "the admission of such alien would be contrary to the security interests of the ~~Untied~~ United States." 22 U.S.C. 2691(a).

The Amendment provides, however, that it does not authorize or require "the admission * * * of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization." *Ibid.*

b. Applications for nonimmigrant visas do not typically raise foreign policy concerns.[2] In certain cases, however, the decision whether to grant or deny a visa has significant diplomatic consequences. As explained in the affidavit of then-Under Secretary of State for Political Affairs Lawrence S. Eagleburger (J.A. 57-58):[3]

> The overwhelming majority of NIV [nonimmigrant visa] applications involve only the ordinary circumstances of aliens seeking to visit the United States

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[2] According to an affidavit filed in the district court in March 1984, for the preceding 20-year period in which the State Department had kept such statistics (1963-1983), consular officers issued nearly 70 million nonimmigrant visas, and denied (on foreign policy *or* internal security grounds) only 519 applications for such visas under Subsection 27 (J.A. 89). During the most recent period, from 1981 through 1983, six to seven million nonimmigrant visas had been granted annually, and an average of less than 30 were denied under Subsection 27 (*ibid.*). These figures are also found in the Statement of Joan M. Clark, Assistant Secretary of State for Consular Affairs, Department of State, *Exclusion and Deportation Amendments of 1983: Hearing on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 90 (1984); and Bureau of Consular Affairs, Dep't of State, *Reports of the Visa Office* (FYS-1980, 1981, 1982). See also J.A. 59 ("denial of [nonimmigrant visa] applications for reasons of foreign policy is extremely rare").

[3] In the district court, in support of its motion to dismiss or, in the alternative, for summary judgment, the government submitted one public affidavit of Under Secretary Eagleburger (J.A. 56-82) and two public affidavits of Deputy Assistant Secretary of State Louis P. Goelz (J.A. 83-93, 110-114). The government also filed three classified affidavits from Under Secretary Eagleburger, which were submitted for the district court's in camera inspection (Pet. App. 86a-94a). These

> for reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

See also J.A. 62; Pet. App. 86a, 90a-91a.

For these reasons, the Department of State provides special guidance to its consular officers whenever visa applications raise national security or foreign policy concerns. In such cases, agency guidelines require consular officers to refer the case to the Department for an advisory opinion prior to the issuance or refusal of a visa. Advisory opinions are particularly required when a consular officer has reason to believe that an applicant may be ineligible under Subsection 27. See J.A. 58; 9 Dep't of State, *Foreign Affairs Manual*, Pt. I , § 41.91(a)(27) (1975). The Department renders an advisory opinion "only after a thorough review of the information available to the Department and the recommendations of those officers

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classified affidavits were also submitted in camera to the court of appeals.

Following the remand of these cases from the court of appeals, the government determined that the passage of time would permit declassification of nearly all of the in camera affidavits. Only one paragraph and part of one sentence in one of the affidavits (see Pet. App. 92a, 94a) remain classified. The affidavits, as declassified, have been provided to respondents.

responsible for the geographic and policy areas affected" (J.A. 59). Only the Assistant Secretary of State for Consular Affairs or a superior officer may issue an opinion advising against issuance of a visa on foreign policy grounds (J.A. 89). In sensitive cases, the Secretary of State or his immediate designee (such as the Under Secretary of State for Political Affairs) may make the determination (*ibid.*).

2. Tomas Borge, Olga Finlay, Leonor Rodriguez Lezcano, and Nino Pasti applied for nonimmigrant visas to meet and talk with American citizens who had invited them to come to the United States. Based on advisory opinions from the Department of State, consular officers denied each application under Subsection 27.

a. Tomas Borge was invited by the plaintiffs in *Abourezk* v. *Reagan*.[4] Borge is the Interior Minister of Nicaragua, and one of the highest ranking and most influential members of the Sandinista Front for National Liberation, the ruling body of Nicaragua (Pet. App. 86a; J.A. 90). In November 1983, the Nicaraguan government submitted a diplomatic note to the United States Embassy in Managua, Nicaragua, requesting that Borge be issued a nonimmigrant visa for a five-day visit to the United States (J.A. 90). The request was accompanied by a diplomatic passport that the Nicaraguan government had issued to Borge (Pet. App. 86a-87a).

Under Secretary Eagleburger rendered an advisory opinion that Borge was ineligible for a visa under Subsection 27, having determined that his admission would be "highly prejudicial to the foreign policy interests of the United States" (see Pet. App. 88a). See also J.A. 60, 90. In making this judgment, Eagleburger concluded, inter alia, that Borge "intended to travel to the United States *in his*

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[4] The plaintiffs in *Abourezk*—members of Congress, university professors, journalists, and religious leaders—invited Borge to the United States to discuss issues regarding Central America and Nicaragua. See Pet. App. 5a, 66a; J.A. 3.

official capacity," and that his admission at that particular time would send "a very wrong message to our allies and adversaries alike concerning United States policies in Central America, and could have had a severely adverse impact on ongoing multilateral efforts by the United States to resolve the current conflict in that region" (Pet. App. 86a-87a (emphasis in original)). Eagleburger further noted that a visit in October 1983 by the Foreign Minister of Nicaragua had "undercut * * * multilateral negotiations" (*id.* at 87a).

b. Olga Finlay and Leonor Rodriguez Lezcano were invited by the plaintiffs in *City of New York* v. *Shultz*.[5] Both are officials of the Communist Party of Cuba, and both are members of the Federation of Cuban Women, an organization which the Department of State has determined to be affiliated with and controlled by the Cuban Communist Party (Pet. App. 89a; J.A. 91-92). Finlay, in addition, is the Cuban representative to the United Nations Commission on the Status of Women (J.A. 91). In September 1983, Finlay and Lezcano applied for 30-day, nonimmigrant visas to the United States. Their applications were accompanied by diplomatic passports, and were transmitted to the consular officer in Havana, Cuba, by diplomatic note. Pet. App. 90a; J.A. 92.

The Assistant Secretary for Consular Affairs, in an advisory opinion ratified by Under Secretary Eagleburger, determined that Finlay and Lezcano were ineligible for visas under Subsection 27, since their entry would prejudice the foreign affairs of the United States (see J.A. 61, 92). In Eagleburger's view, both applicants "intended to travel to the United States not as private Cuban citizens,

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[5] The plaintiffs in *City of New York* – the New York City Commission on the Status of Women and several women's studies programs at various universities – invited Finlay and Lezcano to the United States to discuss issues concerning women. See Pet. App. 6a, 67a; J.A. 32-33.

but rather as official representatives of the Cuban Government" (Pet. App. 90a; see J.A. 61). He found that "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (*ibid.*). Eagleburger concluded that their entry would be inconsistent with our foreign policy toward Cuba, a policy which seeks to curb Cuban influence in Central and South America by denying to it "the aura of legitimacy which normal diplomatic relations with the United States would undoubtedly confer" (Pet. App. 90a).

c. Nino Pasti was invited by the plaintiffs in *Cronin* v. *Shultz*.[6] Formerly a general in the Italian military and a member of the Italian Senate, Pasti is an active participant in the World Peace Council, an organization which the State Department has determined is "controlled and financed" by, and is an "instrumentality" of, the Soviet Union (Pet. App. 92a; J.A. 90-91). In September 1983, Pasti applied to the American Embassy in Rome for a nonimmigrant visa (J.A. 91).

As in the other cases, Pasti's application was referred by the consular officer to the Department of State for an advisory opinion (J.A. 91). The opinion, authored by the Assistant Secretary of State for Consular Affairs, concluded that Pasti was ineligible to receive a visa under Subsection 27, because his admission would prejudice the conduct of United States foreign policy (see J.A. 61, 91). Under Secretary Eagleburger, who ratified the opinion, noted that the World Peace Council is an instrument for Soviet efforts to disrupt American foreign policy; he emphasized that the timing of Pasti's proposed trip coincided

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[6] The plaintiffs in *Cronin* are principally groups advocating nuclear disarmament. They invited Pasti to attend and speak at a rally in Boston. Pet. App. 5a, 66a-67a; J.A. 46.

with the "particularly delicate period" during the controversial "initial deployment of Cruise and Pershing II missiles in certain NATO countries" (Pet. App. 92a-94a).

3. a. The individuals and groups who invited these four aliens each filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. Plaintiffs alleged that the government acted without statutory authority in denying the visas because: Subsection 27 does not authorize exclusion on the basis of foreign policy (as opposed to national security) concerns; Subsection 27 does not authorize the exclusion of an applicant when it is his mere entry or presence (as opposed to the specific activities in which he intends to engage) that will be prejudicial to the public interest; and the government's interpretation of Subsection 27 is contrary to the McGovern Amendment, 22 U.S.C. 2691. Plaintiffs also complained that the visa denials in these cases violated their First Amendment rights to associate with their invitees and listen to them in this country. Finally, plaintiffs contended that Subsection 27, as construed by the government, is an overbroad delegation of legislative authority, contrary to separation of powers principles. Pet. App. 14a; J.A. 30-55, 115-130.

The district court entered summary judgment for the government (Pet. App. 81a). Judge Greene rejected each of plaintiffs' statutory arguments, concluding that the government's actions were fully within the ambit of Subsection 27 (*id.* at 72a-75a). The court further held that under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the facially legitimate and bona fide reasons advanced by the government in support of its actions defeated plaintiffs' First Amendment claims (Pet. App. 75a-80a). In addition, the district court rejected plaintiffs' separation of powers argument, noting that "in foreign affairs matters and

those involving the admission of aliens, the political branches have the widest possible latitude" (*id.* at 76a n.19).

b. On appeal, a divided panel vacated the district court's judgment and remanded for further proceedings (Pet. App. 82a-83a). The court agreed with the government that Subsection 27 may properly be invoked to deny visas because of foreign policy concerns (*id.* at 14a-16a), but ruled against the government and remanded on two other statutory issues.[7]

It found, first, that the record was inadequate to decide whether Subsection 27 permits exclusion based only on concerns sparked by an alien's entry or presence in the United States (Pet. App. 16a-22a). In reaching this conclusion, the court noted that the language of Subsection 27 refers only to an alien's expected "activities," not his presence or entry (*id.* at 16a). Nor, in the court's view, did the legislative history resolve the issue in the government's favor; instead, the court found that the history "is terse and tugs in more than one direction" (*id.* at 17a). Similarly, the court found that the evidence of administrative practice was too "meager" to give rise to a presumption of congressional acquiescence in the government's view that Subsection 27 applies to entry or presence (*id.* at 21a).[8]

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[7] The court also rejected the government's threshold objections to judicial review: that the cases were moot, that plaintiffs lacked standing, and that the district court lacked subject matter jurisdiction (Pet. App. 8a-13a).

[8] The court nevertheless found in the record "at least one instance, of which Congress was apprised," in which the State Department actually excluded an alien because of concerns about his mere presence in the United States (Pet. App. 21a). The court also recognized that 9 Dep't of State, *Foreign Affairs Manual*, Pt. II, § 41.91(a)(27)(1.4) (1975), gave as an example of an alien excludible under Subsection 27 one who engaged in physical brutality while in political power (Pet. App. 19a-20a); the court acknowledged that this "example in the

Nevertheless, believing that "[i]nformation about such acquiescence, or the absence of it, would rank as a significant indicator of the legislature's will" (*id.* at 18a), the court remanded for "fuller proceedings" on the nature of administrative practice under Subsection 27 (*id.* at 22a).

Second, the court ruled that the district court had improperly analyzed the relationship between Subsection 27 and Subsection 28 (Pet. App. 22a-30a). The court held that the government may exclude aliens under Subsection 27 for foreign policy reasons only if those reasons are "*independent of*" and not merely "*in addition to*" the fact that the aliens are members of, or affiliated with, the communist and anarchist organizations listed in Subsection 28 (*id.* at 24a (emphasis in original)). Any other holding, the court reasoned, would "nullif[y]" the restrictions placed by the McGovern Amendment on the use of Subsection 28 (*id.* at 23a); for this point the court (*id.* at 23a-24a n.16) relied in part on a similar holding in *Allende* v. *Shultz*, 605 F. Supp. 1220 (D. Mass. 1985). In adopting this interpretation, the court recognized that affiliation with a hostile government may qualify as proper grounds for the denial of a visa under Subsection 27, but held that such affiliation may not be "presumed *because of* the applicant's membership or participation in a subsection (28) organization" (Pet. App. 27a (emphasis in original)). The court therefore remanded for a determination as to whether governmental affiliation, independent of organizational affiliation, was "*the* reason" for the exclusions in these cases (*id.* at 27a-28a (emphasis in original)).

In view of its rulings on the statutory issues, the court declined to consider plaintiffs' constitutional claims (Pet. App. 30a n.24).

Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone" (*id.* at 20a).

c. Judge Bork dissented (Pet. App. 34a-64a). He concluded that the majority's decision deprived the Executive "of much of the flexibility and nuance that are essential in the conduct of foreign relations" (*id.* at 60a), and began "a process of judicial incursion into the United States' conduct of its foreign affairs" (*id.* at 64a).

Judge Bork criticized the majority's analysis of the "entry/presence" issue (Pet. App. 38a-47a). In his view, the legislative history of Subsection 27 and its statutory predecessors unambiguously settles the question. That history, he found, includes at least six occasions in which Congress clearly interpreted the term "activities" to "encompass[] entry and presence as well" (*id.* at 42a; see *id.* at 38a-42a). Furthermore, to the extent that the issue could be considered close, Judge Bork noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the courts must defer to a reasonable administrative interpretation, especially in the foreign policy context (Pet. App. 36a-38a, 43a). Applying the *Chevron* test, he found "it difficult to understand how an interpretation offered half a dozen times by Congress * * * can possibly be unreasonable when adopted by officials in the executive branch" (*id.* at 43a). Given the reasonableness of the Executive's view that Subsection 27 applies to mere presence or entry, Judge Bork found no need for evidence of congressional acquiescence, and thus no need for the majority's remand on this issue (*id.* at 44a-47a). Moreover, Judge Bork found that evidence supporting the government's position already existed in the record (*id.* at 44a-45a n.2).

Judge Bork also disagreed with the majority's interpretation of the McGovern Amendment and its analysis of the relationship between Subsections 27 and 28 (Pet. App. 47a-60a). He thought it clear, based on the statute's language and legislative history, that Congress intended the restrictions in the Amendment to apply only "when the

sole ground for exclusion is membership in an organization of the sort described [in Subsection 28]. When that membership raises additional concerns, as it does when it involves a connection to a government that implicates American foreign policy, subsection (27) comes into play," and the McGovern Amendment does not apply (*id.* at 53a). Since in the present cases the Executive has "consistently cited" the aliens' affiliations with particular foreign governments as the basis for exclusion, Judge Bork concluded that the McGovern Amendment is inapposite (*id.* at 54a). Judge Bork emphasized that his interpretation fully serves the intent of the McGovern Amendment, since it would not justify the wholesale exclusion of all members of Subsection 28 organizations, but only those whose organizations are connected to foreign governments (*id.* at 55a-56a). Judge Bork wrote, for example, that "[i]t would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country" (*id.* at 55a). On the other hand, he pointed out, the majority's interpretation leads to the anomalous result of "confer[ring] upon communists a favored entry status": members of non-Subsection 28 organizations may be excluded under Subsection 27 because their organizations are tied to hostile regimes, but members of Subsection 28 groups may not (*id.* at 56a). Further, Judge Bork noted that the majority's construction, although adopted to prevent the Executive from "evading" the McGovern Amendment, is "toothless"—and thus fails on its own rationale—for two reasons (*id.* at 57a-59a). First, because the Amendment states only that the Secretary of State "should"—not "shall"—recommend the admission of a member of a proscribed organization,

"it is at least an open question whether the terms of the * * * Amendment are in fact mandatory" (*id.* at 57a). Second, even if the Secretary were obligated to render a favorable recommendation, the Attorney General, under 8 U.S.C. 1182(d)(3), would have complete discretion not to accept it (Pet. App. 58a-59a).

Having concluded that Subsection 27 thus authorized the exclusions in these cases, Judge Bork also addressed plaintiffs' First Amendment argument. He found this argument "obviously" without force under *Kleindienst* v. *Mandel, supra*, and other "clear and consistent" Supreme Court precedent (Pet. App. 60a, 63a). Judge Bork pointed out that the aliens here were not denied visas because of the content of their political beliefs, but because they "are members of or connected with particular foreign governments" (*id.* at 62a). Judge Bork also rejected plaintiffs' argument that the discretion delegated to the Executive under Subsection 27 is so broad that it violates separation of powers principles; he found the challenge insubstantial under the many rulings by this Court upholding the constitutionality of "broad and discretionary Executive power" in the foreign policy arena (*id.* of 63a).

d. The government petitioned the court of appeals to rehear these cases en banc. Of the court's eleven judges, five voted in favor of granting the petition, four voted against, and two did not participate in the vote. Accordingly, the petition was denied. Pet. App. 85a.

SUMMARY OF ARGUMENT

A. Contrary to the opinion of the court of appeals, Subsection 27 authorizes the exclusion of aliens whose entry or presence in the United States raises foreign policy concerns. The district court correctly pointed out that "the distinction between an alien's activities and his presence in the United States is one without a difference" (Pet. App. 72a-73a). Any person admitted must engage in some ac-

tivity, and entry alone can have dramatic effects on American foreign policy (*e.g.*, the admission of the Shah of Iran). And, as Judge Bork tellingly noted in dissent, "it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest" (*id.* at 40a). Moreover, Subsection 29, 8 U.S.C. 1182(a)(29), argues against drawing such a distinction, because in it Congress limited an exclusionary provision to conduct "after entry," and because such a distinction would render Subsections 27 and 29 largely duplicative.

Indeed, the legislative history of Subsection 27 demonstrates that Congress intended the provision to exclude aliens whose entry or presence would compromise the conduct of foreign policy. At all events, that history shows that the State Department's interpretation is entirely reasonable. Accordingly, that interpretation, by the agency charged with issuing visas under the Immigration Act, warrants judicial deference (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984)), especially given the foreign policy context. Finally, even if evidence of administrative practice were needed to decide the "entry/presence" issue, the court of appeals' remand is unnecessary, in light of the ample existing evidence "that the Executive has 'openly asserted' the power at issue." *Haig* v. *Agee*, 453 U.S. 280, 303 (1981) (quoting *Zemel* v. *Rusk*, 381 U.S. 1, 9 (1965)).

B. The court of appeals also erred in rejecting the government's contention that Subsection 27 authorizes the exclusion of an alien for reasons which are in addition to—even if they are not independent of—the alien's association with Subsection 28 organizations. Where, as in these cases, that association raises concerns beyond the association per se—such as when the organization is connected with a foreign government and the alien's entry therefore will create foreign policy problems—the

McGovern Amendment does not preclude application of Subsection 27. The alien's association in the organization is no longer the sole ground for exclusion: in the words of the Amendment, the "alien * * * is excludible for reasons other than membership or affiliation with a proscribed organization."

Congress and the Executive have consistently interpreted the McGovern Amendment in precisely this way, as the legislative history and two subsequent amendments to the Amendment demonstrate. Furthermore, the court of appeals' interpretation of the Amendment would create anomalous results, conferring a *favored* entry status on those who are members of Subsection 28 organizations and requiring the Executive to ignore established affiliations, no matter how close, between such organizations and foreign governments. The opinion below is also inconsistent with the approach this Court has taken to overlapping provisions of the Immigration Act. See *Reid* v. *INS*, 420 U.S. 619 (1975). Finally, once again the State Department's intepretation of the relationship between Subsection 27 and the McGovern Amendment is plainly not unreasonable, and is entitled to deference, especially in this foreign policy context.

C. The court of appeals' remand order further demonstrates that its reading of the Immigration Act is incorrect, and it is unsupportably intrusive independently of that error. The court's construction of Subsection 27 and the McGovern Amendment has led it to require that the district court—and respondents—be allowed to "look behind" the "facially legitimate and bona fide reason[s]" offered by the Executive for its visa denials, in precisely the manner this Court forbade in *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). Indeed, this process has already been initiated, in the court of appeals' opinion and in respondents' discovery requests.

Moreover, Subsection 27 has been used sparingly and carefully, and only when "significant diplomatic or foreign policy ramifications" were at stake (J.A. 57-58). Thus, the court of appeals' decision would not only enmesh courts in questions outside the bounds of judicial competence, it would "depriv[e] [the Executive] of much of the flexibility and nuance that are essential in the conduct of foreign relations" (Pet. App. 60a (Bork, J., dissenting)). The court's decision would also require the State Department to ignore obvious alter ego relationships between certain Subsection 28 organizations and foreign states. These unseemly consequences further demonstrate that the court erred in its construction of the statutes at issue.

ARGUMENT

THE GOVERNMENT'S DENIAL OF THE VISA APPLICATIONS AT ISSUE WAS AUTHORIZED BY SUBSECTION 27

A. Subsection 27 Authorizes Exclusion Where An Alien's Entry Or Presence In The United States Raises Foreign Policy Concerns

In refusing to resolve the "entry/presence" issue on the record before it, the court of appeals failed to "give effect to the unambiguously expressed intent of Congress" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted)), as evidenced by the statute's language, structure, and legislative history. In any event, the State Department's interpretation is an entirely reasonable one and thus entitled to deference (*id.* at 842-845), especially in the foreign affairs context. Finally, there already exists ample evidence that this intepretation is supported by past administrative practice.

1. The concern of Subsection 27 is whether an alien's "activities" cause prejudice to the "public interest" or "endanger the welfare, safety or security of the United

States." Since any person admitted to this country must engage in some activity, "the distinction between an alien's activities and his presence" is, as Judge Greene noted, "one without a difference" (Pet. App. 72a-73a). Recent history amply demonstrates that the distinction between entry and activity is basically irrelevant to the statutory purpose. As Judge Greene observed, "[t]he mere entry of the Shah [of Iran] into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Teheran and all that flowed from that episode" (*id.* at 73a). As a matter of common sense, "it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest" (*id.* at 40a (Bork, J., dissenting)).

In sharp contrast, Subsection 29, 8 U.S.C. 1182(a)(29) (emphasis added), requires denial of visas to aliens who "*after entry*" would engage in certain proscribed conduct, including "espionage, sabotage, public disorder, or * * * other activity subversive to the national security." An interpretation that would also limit Subsection 27 to such activities would render it largely duplicative of Subsection 29—a result that would "offend[] the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (citations omitted).

2. Moreover, as exhaustively set forth in Judge Bork's dissent (Pet. App. 38a-42a), the legislative history on this issue—particularly the history of the forerunners to Subsection 27—is decisive. See *INS* v. *Errico*, 385 U.S. 214, 218 (1966) (construction of disputed statute "requires close attention" to the language and legislative history of its predecessor).

Subsection 27 was taken almost verbatim from Section 22 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1006.[9] The Senate Report accompanying the 1950 Act stated that existing law in this area—which Section 22 was intended to "*broaden*[]"—already excluded aliens "whose *entry* would be prejudicial to the public interest or would endanger the safety of the United States." S. Rep. 2230, 81st Cong., 2d Sess. 5 (1950) (emphasis added). The same language is used in S. Rep. 2369, 81st Cong., 2d Sess. 10 (1950). See also S. Rep. 1137, 82d Cong., 2d Sess. 27 (1952) (emphasis added) (report on the Immigration Act, which refers to Subsections 27, 28, and 29 as barring inter alia "alien[s] whose *entry* would endanger the public safety or security of the United States").

Section 22, in turn, was derived from a 1941 statutory provision (Act of June 20, 1941, ch. 209, § 1, 55 Stat. 252),[10] whose legislative history clearly contemplated exclusion of aliens when their entry or presence would injure the public safety. The Senate Report accompanying that provision described it as having the purpose "of keeping

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[9] Both the House and Senate reports stated that Subsection 27 merely "incorporate[s]" Section 22 of the Internal Security Act of 1950. S. Rep. 1137, 82d Cong., 2d Sess. 10 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 30, 49 (1952). Section 22 excluded from admission:

> [a]liens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States * * *.

[10] Section 1, 55 Stat. 252 provided:

> [W]henever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States * * *.

out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety." S. Rep. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added). This theme was emphasized in correspondence, incorporated in the Senate Report, from the Attorney General and Acting Secretary of State. The Attorney General's letter stated that the bill would "authorize the refusal of visas to aliens whose *entry* into the United States would endanger the public safety," and further noted that "[t]he purpose of the legislation is to provide means not now afforded by law of keeping out of this country certain aliens, otherwise admissible, whose *presence* in the United States would be dangerous to the public safety." *Id.* at 1-2 (emphasis added). The State Department's letter similarly described the bill as "authorizing the refusal of visas to aliens whose *admission* into the United States would endanger the public safety." *Id.* at 2 (emphasis added). Likewise, the chief sponsor of the bill explained that it would "authorize the refusal of visas to aliens whose *admission* into the United States would endanger the public safety" and that it "merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose *presence* in the United States will be inimical to the public interest." 87 Cong. Rec. 4757 (1941) (remarks of Senator Russell) (emphasis added).

Against this legislative backdrop, the court of appeals nevertheless stated that the legislative history "tugs in more than one direction" (Pet. App. 17a). Yet, the only opposing pull cited by the court is a reference to prejudicial "activities" in the Conference Report accompanying the 1950 Act. See Pet. App. 17a n.10 (quoting H.R. Conf. Rep. 3112, 81st Cong., 2d Sess. 54 (1950)). And, as explained by Judge Bork (Pet. App. 42a), that discussion merely repeats verbatim the words of Section 22 and does not purport to explain what those words mean.

3. While we thus believe that a common sense reading of the statute and its legislative history suffices to resolve the "entry/presence" issue, there is in any event nothing in the statutory language or history to suggest that the State Department's resolution of the issue is impermissible or unreasonable. Accordingly, since the Department of State is the agency charged with issuing visas under the Immigration Act, its interpretation is entitled to judicial deference. *Chevron,* 467 U.S. at 842-845. Indeed, the demand for deference is heightened here because the question at issue implicates "the conduct of foreign relations" which is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) (footnote omitted). See also *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) (discussing the "classical deference to the political branches in matters of foreign policy"). The authority to exclude aliens is "inherent in sovereignty" (*Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted)) and "intricately interwoven" with the conduct of foreign policy (*Harisiades* v. *Shaughnessy*, 342 U.S. at 588). This authority "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) (citations omitted). The courts should, therefore, "hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915).

4. And, finally, even if evidence of administrative practice were needed to decide the "entry/presence" issue, the court of appeals' remand was unnecessary. As we have noted (pages 12-13 n.8, 14, *supra*), both the panel majority and Judge Bork recognized that the exclusion policy stated in the State Department Manual and a specific past exclusion support the government's reading of Subsection 27. See Pet. App. 19a-21a; *id.* at 44a-45a n.2. Although the

court of appeals relied on *Kent* v. *Dulles*, 357 U.S. 116 (1958), to find these examples inadequate (Pet. App. 21a-22a), "[i]t would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in this record, the Executive lacks the authority to deal with the problem when it is encountered." *Haig* v. *Agee*, 453 U.S. 280, 303 (1981) (footnote omitted). The examples cited by the court of appeals and the dissent, and those listed in the next paragraph, certainly "suffice[] [to show] that the Executive has 'openly asserted' the power at issue" (*ibid.*, quoting *Zemel* v. *Rusk*, 381 U.S. 1, 9 (1965)).

The Office of Legal Counsel of the Department of Justice (OLC) has noted in a published opinion that in 1968 the State Department excluded certain Rhodesians because of concerns not with "any specific activities in which they would engage while here, but [with] the serious adverse foreign policy consequences of allowing them to be present in violation of Security Council Resolution 253." 1 Op. Off. Legal Counsel 64, 70 (1977). Relying, inter alia, on a discussion of legislative history that parallels Judge Bork's (*id.* at 71-72), and a review of materials from the files of the State Department and INS (*id.* at 72-73), OLC concluded that such an exclusion was "based on a reasonable administrative interpretation of [Subsection 27]" (*id.* at 71), and accordingly endorsed a similar exclusion in 1977. See 8 U.S.C. 1103(a) (vesting authoritative executive interpretation of the Act in the Attorney General). The Rhodesian incidents illustrate the consistency—and utility—from Administration to Administration of the government's interpretation of Subsection 27. Indeed, this point was made to Congress in a letter from Joan M. Clark, Assistant Secretary of State for Consular Affairs (*Exclusion and Deportation Amendments of 1983: Hearing on H.R. 4509 and H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law*

of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 197 (1984) (emphasis added)):

> [U]nder all administrations since at least 1959, there have been cases in which nonimmigrant visas have been refused under [Subsection 27] on the ground that the alien's *entry or* proposed activities could have potentially serious adverse foreign relations consequences. Such determinations have been made by this and previous administrations in light of the foreign relations issues of concern at the time, the government's position on the issue, the alien's relationship to the issue, and the potential impact of the alien's *entry or* proposed activities on the government's position.

B. Subsection 27 Authorizes Exclusion For Reasons Which Are In Addition To The Alien's Association With Subsection 28 Organizations

The court of appeals held that the government's use of Subsection 27 in these cases "nullifie[d]" and "evade[d]" the restrictions placed by the McGovern Amendment on the use of Subsection 28 (Pet. App. 22a). To prevent this claimed result, the court would require the government to process visa applicants under Subsection 28, rather than Subsection 27, unless the reason for exclusion is not only in addition to, but independent of, the fact of membership in a Subsection 28 organization (*id.* at 24a). But here again, the statute's language, structure, and legislative history, and the Executive's past administration of the Act, all contradict the court's interpretation. That interpretation, moreover, would create serious anomalies and is inconsistent with this Court's approach to overlapping provisions of the Immigration Act. Finally, the State Department's interpretation is once again at least a reasonable one, and is entitled to deference.

1. The McGovern Amendment, enacted in 1977, simply provides that "the Secretary of State should * * * recommend that the Attorney General grant" a waiver of Subsection 28 excludibility in order to allow temporary admission of an alien who would otherwise be denied a visa "by reason of" membership in a Subsection 28 organization. As explained by Judge Bork, the purpose of the Amendment was to put an end to "the statutorily-required blanket exclusion of virtually all people who were or had been affiliated in some way with [a Subsection 28] organization" (Pet. App. 48a-49a).[11] The Amendment, however, is narrowly circumscribed. It applies only to applicants who are "otherwise admissible," and was amended in 1978 to make clear that it does not apply to "any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization."

We submit that the natural reading of "other than" is "in addition to," rather than "independent of." Thus, where the membership in a Subsection 28 organization raises concerns beyond that of membership per se—such as when the particular organization is connected with a foreign government and the alien's entry therefore will create foreign policy problems—Subsection 27 may properly be invoked. The alien's membership in the Subsection 28 organization is no longer the sole ground for exclusion: in the words of the statute, the "alien * * * is excludible for reasons other than membership in or affiliation with a proscribed organization."

It is, accordingly, quite clear that the visa denials in these cases do not come within the Amendment's ambit. As noted by Judge Bork, the denials were based not on the

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[11] More broadly, the statute's stated purpose was to "achiev[e] greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe [the 1975 Helsinki Accords]," and to "encourag[e] other signatory countries to comply with those provisions." 22 U.S.C. 2691(a).

aliens' memberships in proscribed organizations, but on their affiliations with foreign governments—governments whose relationships with the United States have been "marked with tension" (Pet. App. 52a). Thus, as Under Secretary Eagleburger attested, Tomas Borge was excluded because he "intended to travel * * * *in his official capacity*" as one of the highest-ranking leaders of the Nicaraguan government (*id.* at 86a (emphasis in original)); Olga Finlay and Leonor Rodriguez Lezcano were excluded because they "intended to travel * * * not as private Cuban citizens, but rather as official representatives of the Cuban Government" (*id.* at 90a); and Nino Pasti was excluded because of his active membership in the World Peace Council, an organization "controlled and financed by the USSR" (*id.* at 92a). And in each case the particularized foreign policy problems raised by their proposed visits were noted as well.[12]

2. Congress and the Executive have consistently interpreted the McGovern Amendment to mean just what it says—namely, that it does not apply when an alien is excludible under a category of the Act other than Subsection 28. Indeed, the Conference Report discussing the Amendment states that its provisions affect only those who are excludible "*solely* because of membership in or affiliation with a proscribed organization" (H.R. Conf. Rep. 95-537, 95th Cong., 1st Sess. 31 (1977) (emphasis added)).[13] Thus, it was clear from the outset that if there are reasons "in addition to" membership, then membership is not the "sole"

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[12] That the particular circumstances were considered and the exclusions not reflexively made is further demonstrated by the fact that, in earlier circumstances, three of the four aliens involved here had been granted admission (Pet. App. 28a, 67a n.2; J.A. 92-93). Furthermore, one of the excluded aliens was granted a visa subsequent to the application denied here (J.A. 93).

[13] See also S. Rep. 95-842, 95th Cong., 2d Sess. 16-17 (1978) ("any possibility that a prospective visitor might pose a threat of any kind to U.S. security continues to be a valid reason for exclusion").

reason, even if those additional reasons are not "independent of" membership.[14]

This understanding was underscored in hearings conducted in April 1979 by the Commission on Security and Cooperation in Europe, an investigative body created by Congress (Pub. L. No. 94-304, 90 Stat. 661) for the purpose of monitoring compliance with the Helsinki Accords.[15] As the Assistant Secretary of State for Consular Affairs stated to the Commission:

> [T]he [McGovern Amendment] does not apply to applicants ineligible on grounds other than, *or in addition to,* mere organization membership. An applicant who seeks to enter the United States "solely, principally or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States" is ineligible under Section 212(a)(27) of the Act *regardless* of whether he is also ineligible under Section 212((a)(28) by reason of organization membership.

Basket Three: Implementation of the Helsinki Accords: Hearings Before the Commission on Security and

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[14] Significantly, the legislative history of the original Amendment apparently offers only two examples of the kinds of persons to whom the McGovern Amendment would apply: Eurocommunist leaders and communist labor leaders. See S. Rep. 95-194, 95th Cong., 1st Sess. 13, 32 (1977); see also S. Rep. 95-842, 95th Cong., 2d Sess. 16 (1978). As Judge Bork pointed out (Pet. App. 53a), the inclusion of these categories in no way forbids honoring "a specific Executive concern over admitting a particular person associated with a foreign government that the Executive considers in some respects adversarial to ours." Indeed, Congress made this clear when it amended the McGovern Amendment in 1979 (see pages 28-31, *infra*).

[15] The Commission, as required by Pub. L. No. 94-304, 90 Stat. 661, is composed of 15 members, including six from the Senate, six from the House, and one each from the Departments of State, Defense, and Commerce.

Cooperation in Europe, 96th Cong., 1st Sess. 50 (1979) (emphasis added) [hereinafter cited as *Helsinki Hearings*].

Similarly, the Associate Attorney General explained to the Commission that "[a]ssuming a visa applicant is in fact ineligible for admission to this country because he or she meets the criteria of either paragraphs (27) or (29), there is simply no call to trigger the mechanism set forth in the McGovern amendment." *Helsinki Hearings* 20.

The same point was also made in a colloquy between the Chairman of the Commission, Representative Fascell, and another Commission witness, Hume Horan, the Deputy Assistant Secretary of State for Consular Affairs, where each agreed that the government's interpretation here of the interplay between Subsection 27 and the McGovern Amendment is correct:

> Mr. HORAN. * * * The McGovern amendment, in effect, requires that the Secretary of State recommend that the Attorney General grant a waiver under the authority of section 212([d])(3)(a) of the act for any nonimmigrant applicants ineligible for a visa solely—and I stress the word "solely"—by reason of membership in a proscribed organization unless the applicant's admission would be contrary to the security interest of the United States.
>
> Chairman FASCELL. In other words, if a person would be excludable under paragraphs (27) and (29), then he couldn't be admitted under (28)?
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> Mr. HORAN. Exactly. That is an important point.
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> Chairman FASCELL. With or without the McGovern amendment.
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> Mr. HORAN. Mr Chairman, that is the point we often make.
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> Chairman FASCELL. Yes, I know. But some people just can't seem to grasp that point. So we have to keep making it over and over again. * * *

> Mr. HORAN. We should emphasize that the law does not apply to applicants ineligible on grounds other than, *or in addition to,* their organization membership. An applicant who seeks to enter for other such reasons is ineligible and excludable under sections 212(a)(27) and 212(a)(29) of the act.

Helsinki Hearings 39 (emphasis added).

The validity of this construction was confirmed when, four months after the Commission held its hearings, a provision was added to the McGovern Amendment to make clear that it does not apply to "representatives of purported labor organizations in countries *where such organizations are in fact instruments of a totalitarian state*" (see 22 U.S.C. 2691(b) (emphasis added)). Representative Solarz, the co-sponsor of this provision, explained that it is designed to insure the exclusion of

> so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe, who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the state.

125 Cong. Rec. 8345 (1979). In responding to questions on the House floor, Representative Solarz stressed that the new provision simply clarifies that the McGovern Amendment, as originally enacted, was never intended to provide a haven for such aliens:

> Mr. FASCELL. Mr. Chairman, I just want to say to [Representative Solarz], with respect to this [addition to the McGovern Amendment], it certainly was not the intention of the original language, which this amendment seeks to amend, to authorize in any way, directly or indirectly, the admission into the United States of any individual who is excludable under present law.
>
> The gentleman agrees with that statement, does he not?

> Mr. SOLARZ. Mr. Chairman, I fully agree with the gentleman that that was not the intent of the original language.

Ibid. Thus, as noted by Judge Bork (Pet. App. 54a), while the Solarz provision specifically concerns only labor leaders, it reflects a broader understanding regarding the limits of the McGovern Amendment: that representatives of foreign governments who are otherwise excludible may be denied visas notwithstanding their affiliation with Subsection 28 organizations. The "virtually conclusive" significance of such an enactment, approving an established administrative construction of the statute being amended, has often been stressed by this Court. See, *e.g.*, *CFTC* v. *Schor,* No. 85-621 (July 7, 1986), slip op. 12, and cases there cited.

3. The court of appeals' interpretation not only ignores the language and history of the McGovern Amendment, it would create anomalous results. As the panel apparently acknowledged (Pet. App. 27a n.21), its ruling confers a *favored* entry status for those who are members of Subsection 28 organizations—a result that would effectively stand that subsection on its head. See *id.* at 56a-57a (Bork, J., dissenting); cf. *Reid* v. *INS,* 420 U.S. 619, 628-629 (1975). The purpose of the Amendment was not to effect a "change in overall U.S. policy toward Communism." S. Rep. 95-842, 95th Cong., 2d Sess. 16 (1978). Indeed, the court's ruling would require the Executive to ignore an established affiliation between a particular Subsection 28 organization and a particular foreign government, no matter how close the nexus between them may be. In the *Cronin* v. *Shultz* case, for example, the court has refused to permit the government to conclude that Nino Pasti is an undisclosed agent of the Soviet Union based on his membership in the World Peace Council. Yet, as we have noted, the State Department has determined that the World Peace Council is an instrumentality

of the Soviet Union. See page 10, *supra*. As one Department document concluded, the World Peace Council has a "preponderance of Soviet and pro-Soviet personnel in [its] key * * * leadership and decision-making positions"; "the bulk of its expenses are met by the Soviet Union"; and it "operate[s] however Soviet foreign policy interests dictate" (Dep't of State, *Foreign Affairs Note: World Peace Council: Instrument of Soviet Foreign Policy* (Apr. 1982), *reprinted in* J.A. 64-65, 66, 71). There is simply no basis for the court of appeals' assumption that Congress intended in the McGovern Amendment to have the Executive close its eyes to such an alter ego relationship.

4. The court of appeals' approach in interpreting the McGovern Amendment is also contrary to *Reid* v. *INS*, *supra*, where this Court construed a similar waiver provision under the deportation sections of the Act. *Reid* involved the interplay between Section 241(a)(1), 8 U.S.C. 1251(a)(1), which requires deportation of aliens excludible at the time of entry, and Section 241(a)(2), 8 U.S.C. 1251(a)(2), which requires deportation of aliens who entered the United States without inspection. Unlike the second provision, Section 241(a)(1) was subject to mandatory waiver for certain aliens who were initially excludible because they had obtained entry by fraud. Like the McGovern Amendment, however, this waiver applied only to aliens who were "otherwise admissible." The petitioners in *Reid* had entered the United States by misrepresenting themselves to be United States citizens—conduct which fell within the Section 241(a)(1) waiver. The government, however, brought deportation proceedings under the nonwaivable provision of Section 241(a)(2). Finding that the petitioners' misrepresentation also fell within this "separate ground," the Court held that the government's reliance on Section 241(a)(2) was not—as the court of appeals here suggests—an "evasion," but rather was fully consistent with statutory authority. 420 U.S. at 622-623.

Similarly, the government is not here precluded from basing its exclusion decisions on the "separate ground" of Subsection 27 just because the facts of these cases also present some overlap with Subsection 28 (compare *Reid,* 420 U.S. at 622-623); the fact that the aliens belong to Subsection 28 organizations cannot immunize them from the operation of other provisions of the Act (compare *id.* at 628-629). As Judge Greene noted, "subsection (27) is a much more closely targeted, narrow provision than is subsection (28)," and "unlike subsection (28), * * * [it] does not authorize waivers at all" (Pet. App. 74a-75a). See also *Castro-Guerrero* v. *INS,* 515 F.2d 615 (5th Cir. 1975); *In re Diaz,* 15 I. & N. Dec. 488 (B.I.A. 1975).

5. Finally, the State Department's interpretation of the relationship between Subsection 27 and the McGovern Amendment is plainly not unreasonable, and is entitled to deference—especially in this foreign policy context—under *Chevron* and the other authorities we have discussed.[16]

C. The Court Of Appeals' Decision Impermissibly Intrudes Into The Executive's Conduct Of Foreign Policy

The court of appeals' remand order further demonstrates that its reading of the Immigration Act is incorrect, and the order is improperly intrusive independently of that error. In *Kleindienst* v. *Mandel,* 408 U.S. at 770, this Court specifically instructed the lower courts not to "look behind" the "facially legitimate and bona fide reason[s]" offered by the Executive for exclusion of aliens. Such an inquiry, the Court explained, would bring the judiciary into an area committed " 'exclusively [to] the political branches of government' " (*id.* at 765). Accord, *e.g., Mathews* v. *Diaz,* 426 U.S. 67, 81 (1976);

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[16]The court of appeals apparently held that even its interpretation of the McGovern Amendment was satisfied in the case of Tomas Borge (Pet. App. 29a n.23).

Shaughnessy v. *Mezei*, 345 U.S. 206, 210 (1953); *Harisiades* v. *Shaughnessy*, 342 U.S. at 589 (footnote omitted) (matters regarding aliens "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").[17] Yet the court of appeals' construction of Subsection 27 and the McGovern Amendment has caused it to embark on precisely that inquiry and interference. On the "entry/presence" issue, the court has demanded that the government "come forward with further examples of the exercise or assertion of power to exclude under subsection (27) on the basis of presence alone," and indeed requires that respondents be given "sufficient discovery to contest those examples and provide counter-examples" (Pet. App. 21a-22a (footnote omitted)). On the McGovern Amendment issue, the court requires further analysis of whether the visa applicants "have governmental affiliations independent of their membership in subsection (28) organizations" (see, *e.g.*, *id.* at 29a n.23). See also *id.* at 30a-32a.

Respondents have, indeed, already taken the court's remand on the administrative practice issue as an invitation to discover the rationale underlying prior Subsection 27 exclusions. For example, in one discovery request, plaintiffs ask the Department of State to "describe the facts which formed the basis" for "every instance from January 1, 1970 to the present in which a visa was denied pursuant to" Subsection 27. Plaintiffs' First Set of Interrogatories

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[17] While this principle was developed in the context of rejection of constitutional claims, it obviously serves *a fortiori* as a guide to statutory construction in this field. Cf. *Kleindienst* v. *Mandel*, 408 U.S. at 753-754; *Doherty* v. *Meese*, No. 86-2335 (2d Cir Dec. 23, 1986), slip op. 817 (footnote omitted) (because Section 243(a) of the Act, 8 U.S.C. 1253(a), vests the attorney general with broad discretion, and because his decision to reject an alien's designation of a country of deportation is a political one involving the conduct of foreign affairs, that decision is "essentially unreviewable").

and Document Requests, para. 12(a) (C.A. App. A66).[18] See also, *e.g.*, *id.* at A180 (para. 4 of Declaration of Charles S. Sims (plaintiffs' co-counsel), discussing the wide discovery needed); Br. in Opp. 15. Presumably, because the court of appeals' order allows plaintiffs to "contest" the examples produced by the government, plaintiffs will claim that they are entitled to cross-examine government officials regarding the reasons behind each example offered—a result fundamentally inconsistent with the Executive's exclusive discretion in this area. Cf. Pet. App. 54a-55a n.5 (Bork, J., dissenting) ("requiring the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas").

On the McGovern Amendment issue, plaintiffs are likely to seize upon the court of appeals' remand order as authority to dispute any government determination that the visa applicants (independent of their organizational ties) are affiliated with foreign states. See Pet. App. 51a-52a n.4. Indeed, the court of appeals itself posed just such a dispute in the case of Leonor Rodriguez Lezcano. The court stated that it did "not now comprehend any basis for claiming that [Lezcano has] governmental affiliations independent of [her] membership in subsection (28) organizations" (Pet. App. 29a n.23). The court's conclusion, however, cannot be reconciled with Under Secretary Eagleburger's finding that "[t]he official, governmental nature of [both Lezcano's and Olga Finlay's] proposed trip was clearly manifested both by the issuance to the two women of Cuban diplomatic passports and by the submission of their applications through diplomatic channels" (J.A. 61). By reviewing—and indeed rejecting—the Under

[18] This discovery request was originally served on December 30, 1983, and was revived following the court of appeals' remand order. The district court has stayed all discovery pending this Court's review on certiorari.

Secretary's finding, the court of appeals engaged in an exercise which could not be "further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs" (see Pet. App. 52a n.4 (Bork, J., dissenting)).

It is vitally important that there be unambiguous recognition of the authority of the Department of State to exclude aliens whose presence or entry will impede its conduct of foreign affairs. As we have discussed (pages 6-8, *supra*), Subsection 27 is used sparingly and with special care and, when it is used, it is only because there are "significant diplomatic or foreign policy ramifications" at stake (J.A. 57-58). The court of appeals has, therefore, greatly weakened an important tool of foreign policy, and "deprived [the Executive] of much of the flexibility and nuance that are essential in the conduct of foreign relations" (Pet. App. 60a (Bork, J., dissenting)). Nor should the Department of State be required to disregard the fact that the entry of a particular alien can have diplomatic repercussions, or the reality that some organizations are controlled by foreign governments. If the court of appeals' decision were allowed to stand, it would accordingly not only enmesh the courts in questions outside the bounds of judicial competence, it would cast a chill over Executive decisionmaking and impair the conduct of foreign policy.

Thus, the error of the court's reading of the statutes here is further demonstrated by the unsupportable result to which it has led: unseemly inquiry by plaintiffs and courts into the Executive's foreign affairs decisionmaking, and substantial hindrance of its conduct of foreign affairs.[19]

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[19] Respondents' principal constitutional complaint is that the visa denials deprived them of their First Amendment rights to hear and speak with their invitees. Under *Kleindienst* v. *Mandel*, 408 U.S. at 770, such a complaint cannot survive when the reason for the denials is "facially legitimate and bona fide." As we have shown (pages 8-11, 26-27, *supra*), the aliens here were excluded because of their affilia-

tions with hostile foreign regimes—a reason which even the court of appeals majority recognized as legitimate under Subsection 27 (Pet. App. 26a-27a). Accordingly, as Judge Bork and Judge Greene—the two judges who reached the constitutional issue—concluded (*id.* at 60a-64a, 80a), there can be no doubt that this reason satisfies the *Kleindienst* test.

Similarly without merit is respondents' argument that Subsection 27 is an overbroad delegation of legislative authority. In its delegations of power in the area of foreign relations, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas" (*Zemel* v. *Rusk*, 381 U.S. at 17). This Court therefore long ago rejected the very sort of separation of powers argument raised by plaintiffs here. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-544 (1950) (rejecting separation of powers attack against 55 Stat. 252, a predecessor of the current Immigration Act). The argument has no greater strength today. See also Pet. App. 63a (Bork, J., dissenting).

Although respondents' constitutional claims were not reached by the court of appeals' majority, this Court clearly has discretion to consider them in the course of reviewing the court of appeals' judgment. Since the issues were "squarely presented and fully briefed" (*Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980)) in both courts below, and present this Court with "purely legal question[s]" (*Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985)) that are controlled by clear and consistent precedent, those claims should be rejected at this time. To remand the issues would ill serve "the interests of judicial administration" (*Carlson* v. *Green*, 446 U.S. at 17 n.2). See also *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 n.15 (1981); *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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